No. 02-249

(5)

Supreme Court, U.S.
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In The

Supreme Court of the United States

PEABODY COAL COMPANY,

Petitioner,

v.

WILMA GROVES and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S SUPPLEMENTAL AUTHORITY

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 533-2361

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3 pp

PETITIONER'S SUPPLEMENTAL AUTHORITY

1. In a published decision issued on December 20, 2002, the United States Court of Appeals for the Fourth Circuit clarified its rejection of any treating doctor preference rule. The decision sharpens the principal difference between the Fourth Circuit and the Sixth Circuit, and demonstrates the inaccuracy of the Department of Labor's characterization of the issue. *Consolidation Coal Co. v. Held*, __ F.3d ___, No. 99-2507 (4th Cir. Dec. 20, 2002) ("*Held*").

2. The Sixth Circuit repeatedly has accorded substantial, if not controlling, weight to the opinion of a claimant's doctor because of the doctor's status as the treating physician. It is not necessarily an automatic preference, but it is a preference that controls the outcome when it is applied. In *Held*, the ALJ accorded more weight to the treating doctor because of a ten-year long relationship with the miner, but not for any articulated medical reason.

The Fourth Circuit rejected the preference, noting, "Even were it permissible to accord a physician's opinion greater weight simply due to his treating status, which it is not, treating status would be irrelevant when considering the credentials of the various physicians." *Held*, slip op. at 7. Judge Gregory dissented, noting his preference for the Sixth Circuit's approach in *Jericol Mining Co.*, 301 F.3d 703 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3401 (U.S. Nov. 27, 2002) (No. 02-834).

3. DOL's characterization of the treating doctor rule insists that the only rule that is disputed is an automatic preference that forces the ALJ to ignore the record as a whole once the treating doctor has spoken. DOL correctly notes that no court applies this rule, but incorrectly

implies that this absolute rule is the matter at issue in these petitions. *Held* demonstrates that DOL's repeated efforts to avoid the debate is little more than subterfuge to protect a generally indefensible rule.

4. The decision in *Held* demonstrates also the capability of a treating doctor preference to infect a substantial proportion of black lung benefit adjudications. Not all ALJ's apply the rule, but many do, and when the rule is applied, it is always to overcome the force of other usually stronger evidence.

It is a factor of extraordinary arbitrariness that simply takes over the case, forcing appeals that should not be necessary and contentious litigation. Employers cannot accept the unfair consequences that flow from a treating doctor rule, and claimants will not accept an ALJ's refusal to award benefits when the treating doctor has offered a predictable opinion of the claimant's eligibility for benefits.

This is all the more outrageous and unacceptable in consideration of the Department of Labor's failure to articulate any valid rationale for the rule. No one should accept this rule.

This Court's intervention is needed now to test the validity of the treating doctor rule.

Respectfully submitted,

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 533-2361